ZAMRI MD SOM & ANOR

v.

NURUL FITRIYATON IDAWIYAH NAHRAWI

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL APPEAL NO: MT3-12-261-1999]
20 JULY 2001

TORT: *Damages - Assessment - Personal injuries - Principles and considerations - Several disabilities - Overlapping - Nursing care - Whether quantum excessive - Whether judge erred - Appellate interference*

This was an appeal in a running-down case where the defendants were dissatisfied with the decision of the sessions judge in respect of the quantum of damages awarded. The defendants contended that the learned judge had erred in law in awarding the sum of RM122,000 under separate heads of injury instead of a lump sum besides neglecting to consider deduction for overlapping. The defendants also argued that the award for nursing care of RM300 per month for 20 years was manifestly excessive and the payment period overly protracted.

Held:

[1] The learned judge in the court below had applied himself with obvious care to the medical reports tendered by the respective parties as agreed documents and to the undisputed evidence adduced for the plaintiff in support of her claim. There was therefore no merit in the defendants' contention that the learned judge had erred in coming to the decision that he came to. (p 312 c-d)

[2] Insofar as the quantum of damages for the respective injuries was concerned, the learned judge had referred to the guidelines set by old comparables and given consideration to the pervasive impact of inflation in coming to his decision. Contrary to the defendants' submission, the learned judge had bordered on the periphery of leniency and his award commensurated with the times and was in no way manifestly excessive. (pp 312 a, 314 f & 315 c)

[3] The plaintiff's neurological, neuropsychological and neurophysical disabilities and the increased risk of developing epileptic seizures warranted regular supervision, and in view of her tender years the learned judge was correct in his computation of the award for nursing care. (p 316 a)

[4] In respect of assessment of damages, an appellate court would be disinclined to disturb the findings of the trial judge unless the court is convinced that the learned judge has acted on a wrong principle of law or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered. In the instant case the defendants had failed to show such infirmities. (p 315 e)

[Defendants' appeal dismissed with costs.]

Case(s) referred to:

Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 ***(foll)***
Kuan Kian Seng v. Wong Choon Keh [1995] Mallal's Digest 867 ***(refd)***
Lau Ee Ee v. Tang King Kwong [1986] 1 MLJ 308 ***(refd)***
Liong Thoo v. Sawiyah & Ors [1981] CLJ 126; [1981] CLJ (Rep) 171 ***(foll)***
Marappan & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 ***(refd)***
Muhammad Mushaddiq Juri (an infant) v. Rahmat Jamil [1994] 3 MLJ 153 ***(refd)***
Rasidin Partorjo v. Frederick Kiai [1976] 2 MLJ 214 ***(refd)***
Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 ***(refd)***
Taylor v. Bristol Omnibus Co Ltd & Anor [1975] 2 All ER 1107 ***(refd)***
Topaiwah v. Salleh [1968] 1 MLJ 284 ***(foll)***
Yasin Wahab v. Loo Kok Wai [1980] 2 MLJ 43 ***(refd)***

For the defendants - Amudha Jayaraman; M/s Murali B Pillai & Assoc
For the plaintiff - Justin Morais; M/s Justin Morais & Co

Reported by K Ganesh

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellants (defendants) against the decision of the learned sessions court judge who had on 28 October 1998 given judgment in favour of the respondent (plaintiff) in the sum of RM122,000 by way of damages for pain and suffering, and a further sum of RM300 per month for 20 years for nursing care or supervision, with the usual interest and costs. The appeal is merely confined to quantum, as the appeal against liability has by consent been withdrawn. There is also no submission by learned counsel for the defendants to challenge the award of RM30,000 as the cost of pyschological rehabilitation and is therefore deemed to have been admitted by the defendants.

Submission For Defendants

In respect of the award of RM122,000 for pain and suffering, it was the contention of Cik Amudha Jayaraman, learned counsel for the defendants, that the learned sessions court judge had erred in law in awarding RM122,000 under separate heads of injury when he ought to have awarded a lump sum. She relied on two authorities *viz. Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665 and *Kuan Kian Seng v. Wong Choon Keh* [1995] Mallal's Digest 867 to support her contention.

As an alternative, she submitted that in view of the element of overlapping, there should be a deduction of 20% for the overlapping and for this submission, she cited *Yasin bin Wahab v. Loo Kok Wai* [1980] 2 MLJ 43 and *Lau Ee Ee v. Tang King Kwong* [1986] 1 MLJ 308.

In any event, she argued that the aforesaid award for pain and suffering is too high, and that the award for nursing care was also too high, besides being for too long a period.

Contention For Plaintiff

Encik Justin Morais, learned counsel for the plaintiff, responded that the awards handed down by the learned sessions court judge were correct and reasonable, in the light of fall in the value of money. He added that the award of RM122,000 for pain and suffering under separate heads of injury is not erroneous and therefore should not be disturbed. He submitted that the evidence given by the plaintiff and her father had not been challenged by the defendants and should therefore be taken as having been admitted by them. On the award of RM300 per month for nursing care for 20 years, it is his contention that the award is correct and should be sustained. He therefore prayed that the appeal be dismissed with costs.

Decision Of The Court

At the outset, the parties have agreed to five medical reports tendered by the plaintiff; three reports were from the University Hospital of the University of Malaya dated 31 August 1995, 24 January 1995 and 18 February 1998 respectively; another report as from the Surgical Department of the University of Malaya dated 3 March 1998 and the final report was prepared by neurosurgeon Dr. Richard Veerapen.

The parties have also agreed to two other specialists' reports tendered by the defendants and they were prepared by Dr. Chee Chee Pin on 28 August 1997 and 9 February 1998 respectively.

The authorities relied on by learned counsel for the defendant have established some fundamental principles governing the award of damages by way of a lump sum for several disabilities arising from the same injury. I shall now refer to them for the purpose of extracting some guidelines therefrom.

The Court of Appeal in *Tan Cheng Poh & Anor v. Teow Ah Keow, supra,* held, *inter alia,* as follows:

> It has been long established that in a claim for damages for personal injuries the Court awards a lump sum. The principle of scaling down the total sum assessed for several disabilities on the ground of overlapping is too well established to be disregarded. Thus, where the disabilities stem from one injury, the extent of overlap will be such that there would be a merger. The practice of making separate assessments for the different disabilities that arise from the same injury and then to make a reduction or an allowance for overlapping is wrong. Unless there is a distinct remoteness between the disabilities and pain and suffering that arise from different injuries, the approach in assessing damages for pain and suffering and loss of amenities should be towards awarding one lump sum.

In *Kuan Kian Seng v. Wong Choon Keh, supra,* the Singapore High Court held that:

> where disabilities stem from one injury, the extent of overlap will be such that there would be a merger and hence, allowance for overlapping in computing the award for pain and suffering and loss of amenities is not good enough. In this case, all the disabilities suffered by the plaintiff stemmed from one injury, ie, the brain damage and thus, the judge was right in making a lump sum award instead of making separate assessments for physical and intellectual disabilities, and to allow for overlap thereafter.

On the issue of overlapping, it seems to me that the law is also settled, in that a deduction is permissible where the injuries involve considerable overlapping. Hence, in *Yasin bin Wahab v. Loo Kok Wai, supra,* a total sum of RM25,000 was awarded as damages for five injuries and in view of considerable overlapping, a sum of RM6,000 was deducted. A similar approach was adopted in *Lau Ee Ee v. Tang King Kwong* [1986] 1 MLJ 308, where for considerable overlapping, a sum of RM8,500 was deducted from a total award of RM33,500 for five injuries.

It is true to say that the learned sessions court judge has awarded a sum of RM122,000, which is constituted by the following separate heads of injuries:

1. Loss of consciousness	RM	4,500.00
2. Frontal and Periorbital Haematoma		4,500.00
3. Base of skull fracture		13,000.00
4. Brain injury		100,000.00
Total		RM122,000.00

Be that as it may, the aforesaid authorities do provide certain guidelines, but the overriding question for determination by me is whether the learned sessions court judge has erred in law in awarding the said sum for the said injuries, in the sense that had he applied the lump sum approach, would the award had been less than RM122,000. From the judgment of the learned sessions court judge, it is obvious to me that he has carefully considered all the aforesaid medical reports tendered by the respective parties as agreed documents and also the uncontroverted evidence adduced for the plaintiff in support of the plaintiff's injuries, pain and suffering.

In order to come to a conclusion as to whether the learned sessions court judge has erred in the aforesid award, I propose to embark on a thorough review of comparative cases where awards had been handed down for similar injuries. For ease of reference, I shall tabulate as follows:

1. Loss Of Consciousness (Similar To Cerrebral Concussion)

(1) Award by sessions court judge in 1998	RM4,500.00
(2) Award in *Fuspawangi bt. Hassan v. Chou Hau* [1993] 1 CLJ 289	RM3,000.00
(3) Award in *Fauziyah bte Mansor v. Abu Bakar bin Husin* [1973] Mallal's Digest para 730 (Singapore High Court)	SD3,000.00

2. Frontal And Periorbital Haemotoma

(1) Award by the learned sessions court judge in 1998	RM4,500.00

(2) Award in *Noor Azan bt Bari v. Kaw Teck Guan*, District Court of Singpore DC No. 4186 of 1987 (14 years ago) Mallal's Digest October 1989 para. 1414	SD3,000.00

3. Base Of Skull Fractures (Similar To Fracture Mandible)

(1) Award by the learned sessions court judge in 1998	RM13,000.00
(2) Award in *Khairil Sharmizan bin Kassim (an infant) & Anor v. Zaman bin Sabtu & Anor* [1994] Mallal's Digest Para 1220	RM10,000.00

4. Brain Injury

(1) Award by learned sessions court judge in 1998	RM100,000.00
(2) Award in *Muhammad Mushaddiq bin Juri (an infant) v. Rahmat bin Jamil* [1994] 3 MLJ cliii (brain injury and fracture femur	RM110,000.00

From the comparative studies above, it is noteworthy that the awards referred to were for the respective injuries sustained by the injured parties some eight to ten years ago. It is therefore necessary to take into account the fall in the value of money, as a direct impact of inflation the effect of which is pervasive. Hence, in *Liong Thoo v. Sawiyah & Ors* [1981] CLJ 126; [1981] CLJ (Rep) 171 Chan, J (later JCA) stated:

> Awards tend to increase in value in recent years because of the fall in the value of money ... There is a discernible trend for awards to increase in value in recent years. This is because judges have taken into account the fall in the value of money.

In *Chu Kim Sing & Anor v. Abd. Razak Amin* [1999] 4 CLJ 448, 496, Abdul Malik Ishak, J stated:

> The time has come for the courts to be magnanimous in its awards for running down cases. Old comparables must continue to be used but the quantums must rise and commensurate with the times.

The approach adopted by the learned sessions court judge in awarding the aforesaid damages does not seem to be out of alignment with the awards given in similar cases. Even by taking the sum of RM122,000 as a lump sum award for all the aforesaid injuries sustained by the plaintiff, I am of the view that the award cannot, by any stretch of imagination, be a manifestly excessive award, nor can it be considered manifestly excessive even if the court were to take the element of overlapping into consideration so as to allow for a reasonable reduction. As have been established by the authorities referred to above, in the light of the fall in the purchasing power of money consequent upon the impact of inflation, if at all there was an error on the part of the learned sessions court, the error was manifestly on the side of leniency. In my view, even after a reasonable deduction, a fair and justifiable award would still not be lower than RM122,000.

The role of an appellate court hearing an appeal against the decision of a lower court in respect of assessment of damages has been enunciated by the Federal Court in *Topaiwah v. Salleh* [1968] 1 MLJ 284 in the following words:

> The Federal Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.

In *Rasidin bin Partorjo v. Frederick Kiai* [1976] 2 MLJ 214, the Federal Court reiterated that "on an appeal against the damages awarded, the appellant had to convince the appellate court that the learned trial judge had acted on a wrong principle of law or had misapprehended the facts or had for other reasons made a wholly erroneous estimate of the damages suffered;".

In respect of the cost of nursing care or supervision, neurosurgeon Dr. Richard Veerapen in his report stated:

> Because of this erratic walking and because of the fact that she had epileptic seizures in the past she needs care and supervision particularly when she is out of the house, for example, when travelling by bus to school and walking on the road.

It is obvious that the plaintiff surely needs supervision considering her neurological, neuropsychological and neurophysical disabilities as well as the increased risk of developing epileptic seizures.

In *Muhammad Mushaddiq bin Juri (An Infant) v. Rahmat bin Jamil* [1994] 3 MLJ 153, the plaintiff was a nine year old infant with less serious residual disabilities than the plaintiff in the instant case. The High Court awarded a sum of RM38,400 for future nursing care.

In *Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174, the Supreme Court followed the English Court of Appeal in *Taylor v. Bristol Omnibus Co Ltd & Another* [1975] 2 All ER 1107 where Lord Denning MR held that a plaintiff can claim for cost of care by family members and that "the item for care and nursing was justifiable and should not be any the less if the person concerned was looked after at home instead of in an institution as it now settled that compensation can be given in money for services rendered by parents."

In *Marappan & Anor v. Siti Rahmah bte Ibrahim, supra*, the Supreme Court affirmed the High Court decision which awarded as the multiplier 17 years cost of care (14 months pre-trial care and 16 years post-trial care) for a plaintiff who was 23 years old at the material time. As the plaintiff in the instant case was ten years old at the time of the accident, the 20-year multiplier awarded by the court below is in my view fair and reasonable.

In the light of the foregoing grounds, I uphold all the awards given by the learned sessions court judge and dismiss this appeal with costs.